

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**
MARVEL CHARACTERS, INC., : 21-cv-05316 (DG) (TAM)
: :
Plaintiff, : :
: :
- versus - : U.S. Courthouse
: Brooklyn, New York
NANCI SOLO, ET AL., : :
: March 2, 2023
Defendants :
-----X

TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE TARYN A. MERKL
UNITED STATES MAGISTRATE JUDGE

A P P E A R A N C E S:
(VIA VIDEO/AUDIO)

For the Plaintiff:

Molly Manning Lens, Esq.
Daniel M. Petrocelli, Esq.
Danielle Feuer, Esq.
O'Melveny & Meyers LLP
1999 Avenue of the Stars
Los Angeles, CA 90067

For the Defendant:

Marc Toberoff, Esq.
Jaymie Parkkinen, Esq.
Toberoff & Associates, P.C.
23823 Malibu Road, Ste. 50-363
Malibu, CA 90256

Transcription Service:

Transcriptions Plus II, Inc.
61 Beatrice Avenue
West Islip, New York 11795
RL.Transcriptions2@gmail.com

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1 THE CLERK: This is Civil Cause for a status
2 conference, docket 21-cv-5316, *Marvel Characters, Inc. v.*
3 *Solo, et al.*

4 Before asking the parties to state their
5 appearance, I would like to note the following. Persons
6 granted remote access to proceedings are reminded of the
7 general prohibition against photographing, recording, and
8 re-broadcasting of court proceedings. Violation of these
9 prohibitions may result in sanctions including removal of
10 court-issued media credentials, restricted entry to
11 future hearings, denial of entry to future hearings, or
12 any other sanctions deemed necessary by the Court.

13 Will the parties please state their appearances
14 for the record starting with the plaintiff?

15 MS. LENS: Good morning. Molly Lens with
16 O'Melveny & Myers on behalf of the plaintiff, Marvel
17 Characters, Inc. With me is my partner, Daniel
18 Petrocelli and colleague Danielle Feuer is also on the
19 line.

20 THE COURT: Good afternoon to all of you.

21 MR. TOBEROFF: Good morning. Or I should say
22 good afternoon. Marc Toberoff on behalf of the
23 defendants Nanci Solo, Erik Colan, and recently Rachel
24 Waldman.

25 THE COURT: Good afternoon to you as well. Mr.

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1 Toberoff, are you flying solo today?

2 MR. TOBEROFF: I'm here with my colleague
3 Jaymie Parkkinen who's listening in.

4 THE COURT: Okay. Just wanted to put anybody
5 who's here on the record.

6 All right. So we're here on what I think
7 hopefully is a relatively narrow issue. Specifically,
8 you know, there's been a request for an extension of time
9 to complete discovery and that's obviously been opposed
10 by Marvel.

11 So it is your motion, Mr. Toberoff. So can you
12 give me a sense with precision, sir, of what you actually
13 would like to accomplish? What additional discovery you
14 think is needed here?

15 MR. TOBEROFF: So firstly, Marvel naturally
16 wants to take Rachel Waldman's deposition. I'll refer to
17 her as Rachel. And Rachel wants to be able to take
18 Marvel's deposition which has not yet been taken in the
19 case.

20 In addition to that, Rachel wants the
21 opportunity to engage in discovery. She does not believe
22 it's fair penalizing her for offering to join this case
23 to get this matter resolved more efficiently. It's
24 natural for her to be a part of this case. There could
25 have been a separate action in which she would have a

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1 normal period of time to take discovery and it was
2 decided that it's more efficient to make the second
3 notice and make her a party to this case. And for doing
4 that, we don't believe it's fair to penalize her.

5 Also, she should not be penalized because she
6 has chosen to use the same attorney, namely me. A party
7 has a right to counsel of her choice. And by not
8 permitting her to take normal discovery simply because
9 her counsel had taken discovery on behalf of other
10 parties injects a conflict essentially, you know,
11 depriving her of her counsel of choice because she would
12 be better off having different counsel if the reason for
13 depriving of her discovery is simply because her counsel
14 had the opportunity to take discovery on behalf of
15 different parties.

16 And I point out that Marvel never addressed any
17 of these due process concerns or procedural due process
18 concerns regarding Rachel, regarding the fact that Rachel
19 should have the opportunity to participate and shape
20 discovery.

21 THE COURT: So these are very nice concepts but
22 you haven't answered my question which is what does she
23 want to do specifically?

24 MR. TOBEROFF: You're correct, I didn't go into
25 length, but I did mention that she wants to take Marvel's

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1 deposition.

2 THE COURT: Okay. That's one thing.

3 MR. TOBEROFF: And in addition, she wants to be
4 able to take some discovery of Marvel in this case and
5 not simply rely on the discovery that was taken
6 previously. She has her own idea about this and about
7 what areas should be pressed upon in discovery.

8 For example, forcing Marvel to produce the
9 cases that involve creators again before, and there have
10 been four or five prior cases where Marvel has not
11 produced the interrogatories, the responses to requests
12 for admission, the documents that are relevant to this
13 case that came in those cases that have been specifically
14 requested. Those are documents that Marvel would
15 absolutely have either by virtue of their attorneys,
16 usually large law firms having those documents, and
17 therefore, those documents are within their control or
18 they themselves having kept those documents as most of
19 those cases are not too long ago and they have not --
20 they've produced some of those documents but they haven't
21 produced things like responses to interrogatories,
22 responses to requests for admission. And she would press
23 for that production.

24 And there are other areas where the discovery
25 she believes has been deficient and I can list more of

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1 those areas if you'd like.

2 THE COURT: Go ahead.

3 MR. TOBEROFF: So for instance, a lot of this,
4 a lot of the defenses, a lot of Marvel's argument with
5 respect to the termination notices and work for hire
6 turns on the activity of Stan Lee and the testimony of
7 Stan Lee in a prior case involving Jack Kirby that was in
8 2010 when Stan Lee was alive. And Stan Lee was extremely
9 loquacious and give all sorts of interviews, write
10 letters, publish things in Marvel Comics. And they've
11 produced very little of Stan Lee's communications and
12 Rachel Waldman would like to press for those
13 communications because she believes they would be in
14 Marvel's possession and they have not by and large been
15 produced. Very few of those documents have been
16 produced.

17 THE COURT: Did you ask for them in the prior
18 request for production?

19 MR. TOBEROFF: Yes, we did very specifically
20 and --

21 THE COURT: And why do you think that they're
22 suddenly going to appear because Ms. Waldman is involved?

23 MR. TOBEROFF: Because choices were made. In
24 other words, because these are individuals, they
25 shouldn't be viewed any differently than if they were

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1 general counsel of a company. If the plaintiffs report
2 to the general counsel of Marvel and in a case there are
3 decisions to be made not solely by an attorney but the
4 attorney and the client and decisions what to press for,
5 what not to press for, we on our side, our resources are
6 not unlimited so there are choices that have to be made
7 how to use those resources and what to focus on and those
8 choices are made in consultation with our client and
9 different clients have different views on that.

10 And she has her own views and she wants the
11 opportunity to take discovery to make those choices of
12 what areas should be focused on more and pressed on
13 including, you know, potentially fashioning different
14 requests, more narrow requests, and being able to move to
15 compel in certain areas.

16 THE COURT: Okay. Who's taking the lead for
17 Marvel today?

18 MS. LENS: I am, your Honor. Molly Lens.

19 THE COURT: All right. Ms. Lens, would you
20 like to be heard?

21 MS. LENS: I would, your Honor. I think that
22 you started by asking precisely the right question which
23 is asking defense counsel to identify with precision what
24 exactly the discovery that he seeks to take in this
25 requested additional six months. And that question I

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1 think provides us and the Court with two independent
2 grounds on which to deny defendant's request to extend
3 discovery by six months.

4 The first of those independent bases is the
5 fact that Judge Morrison has already ordered the
6 defendants, to the extent that they sought to open,
7 reopen, or keep open or extend the discovery period,
8 Judge Morrison's minute order which we attached to our
9 opposition required the defendants to present their
10 discovery applications along with the request to extend
11 the discovery schedule. And as per the guidance that she
12 provided at the February 7 hearing as well, she explained
13 that they should not move to simply reopen discovery but
14 rather needed to identify with some particularity what
15 discovery they sought.

16 She then reminded them of that obligation
17 during the parties' ensuing meet and confer discussions
18 but they refused to comply with those directives and
19 moved forward with just an omnibus unspecified request.
20 And so therefore, Marvel would respectfully submit that
21 given their failure to identify with the -- excuse me,
22 given their failure to comply with the judge's orders and
23 instructions, the motion could be denied on that basis
24 alone.

25 But more importantly perhaps is that they

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1 cannot identify with precision any discovery that they
2 actually need or that Ms. Waldman purportedly needs.
3 Rather this is simply a request by the defendants to
4 reopen discovery.

5 Indeed, we heard when pressed defense counsel
6 provided only examples of either discovery that actually
7 had been sought from Marvel. For example, the documents
8 relating to Stan Lee, the documents relating to a prior
9 litigation that Marvel has participated in. That is all
10 discovery that has been actually propounded not only in
11 this case but across the four other pending cases that
12 are being litigated by Mr. Toberoff across the country.

13 And similarly, the deposition of Marvel is
14 something that surely the defendants were in a position
15 to take. We've been in discovery for some 18 months in
16 these cases. We held a hearing before your Honor back in
17 September in which the parties were reminded of the need
18 to comply with the discovery deadline and that good cause
19 would be required to extend it.

20 The discovery schedule was then extended at
21 defendant's request. As we laid out in our papers, they
22 convinced the Southern District of New York to extend the
23 discovery scheduled by some four months so the parties
24 could realign the schedules in this case with the other
25 cases that four month extension was granted by the Court.

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1 But here we are after that long period of
2 discovery and they're simply wanting another bite at the
3 apple. There's no good cause to reopen discovery. Ms.
4 Waldman's entry into this case is a strategic decision by
5 the defendants collectively to try to cure a legal
6 infirmity that they have with respect to the original
7 notices that were raised.

8 I would also note that the purported need to
9 conduct discovery by Ms. Waldman was strategically never
10 raised by the defendants prior to seeking to add her to
11 the case. Rather they attempted to frankly sandbag us in
12 the court with that request. After seeking permission
13 after so many months representing Ms. Waldman, she only
14 sought to be added to the case at the February 7 hearing
15 and then again didn't raise any purported need to conduct
16 discovery until after she actually obtained the Court's
17 permission to be added through the stipulation.

18 Moreover, as we laid out in our papers, this is
19 not the typical situation in which discovery may be
20 reopened when a new party is added. Rather, this case is
21 closely analogous to the situation presented in the *Kirby*
22 case. Ms. Waldman does not have any ability -- you know,
23 even if there is a right to terminate, your Honor, she
24 has no right to terminate without Ms. Solo and Mr. Colan.
25 Similarly, they have no right to terminate without her.

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1 We could have litigated this case without her. She chose
2 to join.

3 And for all of these reasons we respectfully
4 request that the extension be denied. Motions for
5 summary adjudication are due next month and Marvel is
6 anxious after again some 18 months of expensive and
7 burdensome discovery to take this case to be adjudicated.

8 THE COURT: So one of the points raised in your
9 letter and you alluded to it again today is this notion
10 of whether or not there needs to be a deposition of Ms.
11 Waldman and utilization of that argument on behalf of the
12 defendants. Would you like to be heard on that point?

13 MS. LENS: I would, your Honor. Thank you. As
14 an initial matter, I don't think that Marvel's request to
15 take Ms. Waldman's deposition would justify an extension
16 of the discovery period and to permit the defendants to
17 conduct discovery.

18 We requested Ms. Waldman's deposition back I
19 believe on February 3rd. You know, we were asking the
20 defense counsel to let us know where she lives so that we
21 could organize that deposition. They stalled. They
22 refused, Ms. Waldman refused to comply with a validly
23 issued subpoena for her deposition that was issued with
24 proper notice. She simply didn't appear.

25 So as an initial matter Marvel would argue that

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1 we should be permitted to take her deposition out of time
2 but that should have no impact as to the defendant's
3 ability to take discovery.

4 However, if your Honor were to conclude
5 otherwise, Marvel is willing to forgo Ms. Waldman's
6 deposition even though again we don't believe that we
7 should be asked to forego the deposition because one, we
8 sought it well advance of the discovery cutoff and it was
9 defendant's conduct that prevented us from taking the
10 deposition and not any fault of our own.

11 And second, of course we don't think that our
12 request to take her deposition gives them grounds to
13 reopen discovery on Marvel. But again, if required,
14 Marvel feels so firmly that it would be incredibly
15 prejudiced by a six-month extension that we would be
16 willing to forgo that deposition.

17 MR. TOBEROFF: Your Honor, may I address the --

18 THE COURT: Mr. Toberoff, actually I have a
19 very specific question before you start, Mr. Toberoff.

20 MR. TOBEROFF: Sure.

21 THE COURT: How quickly could the deposition of
22 Ms. Waldman be held?

23 MR. TOBEROFF: We would have to schedule it in
24 the month of March. As we explained in the letter and
25 was explained to me by Ms. Waldman, she works for two

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1 positions in a small pain clinic and they have tremendous
2 overload patients who are scheduled in advance. And
3 because it's a pain clinic, the patients are in pain.
4 And so you can't just on a week's notice, which is what
5 Marvel tried to do, blow off these patients. So we would
6 schedule it, I believe we would schedule it, I have to
7 confer with Ms. Waldman, but sometime, you know, towards
8 the end of March, from mid to late March. I'm hopeful we
9 would be able to schedule the deposition then.

10 I want to point out that Ms. Waldman was
11 never -- the subpoena is invalid. They just sent a
12 subpoena over to us. We made no service agreement. They
13 didn't even ask us.

14 Also, may I address some points that were made?

15 THE COURT: Sure.

16 MR. TOBEROFF: Ms. Lens spoke at length about
17 defendants reopening discovery. Defendants, first of
18 all, were not reopening discovery because this motion was
19 made prior to the close of discovery. Judge Morrison, we
20 had a brief discussion with Judge Morrison, but she
21 specifically wanted us to bring a motion before you and
22 defer to you and your judgment as to this issue. So
23 there were no -- I don't view comments, off the cuff
24 comments before this had been briefed in any respect and
25 was spoken of as an additional issue to be a requirement

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1 that were made by Judge Morrison.

2 I think there is -- but in all of the arguments
3 you heard, it was simply lumping Rachel in with the other
4 defendants and saying that therefore Rachel had
5 substantial opportunity to take discovery when in fact
6 she's had zero opportunity to take discovery. There was
7 no strategic decision here.

8 We disagree that Rachel Waldman, because she's
9 been adopted out, she's the daughter of an adopted out
10 child, we disagree that as a matter of federal law she
11 would have been a necessary party for the effectiveness
12 of the notice of deposition. A new notice was served as
13 a cautionary measure, a new notice of deposition, so if
14 the first notice, termination notice, if the Court agreed
15 that the first termination notice which is still a live
16 issue is invalid because you defer to New York law on the
17 issue as opposed to federal copyright law, which we
18 highly doubt, then we served a second notice so that if
19 the first notice were invalid for that reason, then the
20 second notice would be valid. It's a perfectly
21 legitimate thing to do.

22 After we served that notice, we served that
23 notice on November 15th. On November 11th they brought
24 up their argument that the first notice was insufficient
25 because you didn't have three, you had two parties and

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1 they came up and articulated their theory on November
2 11th as to why they thought Rachel would be necessary.
3 We served the notice on November 15th. Right after the
4 holidays, on January 2nd, we proposed adding Rachel, that
5 that would be the most efficient way to resolve this case
6 adding Rachel in the second notice of termination. And
7 the defendants in fact stalled responding. They didn't
8 respond. They never gave us -- Marvel, excuse me. I
9 said defendants. Marvel did not give us an answer. And
10 we had a conference on February 7th. If Marvel had given
11 us an answer and we had added Rachel in early January as
12 we thought would be appropriate, and as Judge Morrison
13 ended up thinking is appropriate and efficient, we would
14 have been able to take discovery. But they stalled that
15 and I can prove that they have run the clock on us and
16 delayed discovery in the other cases.

17 But this is not solely a question of the
18 opportunity that defendants has had. It's a question of
19 what opportunity is Rachel going to have? And again, she
20 shouldn't be penalized by the fact that she chose us as
21 her counsel because if she chose a different counsel,
22 nobody would say to her you're not entitled to take any
23 discovery.

24 THE COURT: That's true, but the judge would
25 rightfully ask what specific discovery are you seeking to

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1 take? And in the absence of an answer, it's very hard to
2 set a proposed schedule.

3 I understand your arguments as to the timing of
4 when she was added and why. I also understand fully
5 where Marvel is coming from with regards to the length of
6 time that has passed during discovery and the relative --

7 MR. TOBEROFF: Your Honor, I couldn't -- I'm
8 sorry I couldn't hear you because of perhaps the cell
9 phone communication.

10 THE COURT: I don't know. I'm not sure.

11 MR. TOBEROFF: Okay.

12 THE COURT: So I understand your argument with
13 regards to the timing of why she was added and when. I
14 also fully understand where Marvel is coming from in
15 terms of not wanting to fully reopen discovery.

16 The issue as I see it is relatively
17 straightforward and it really boils down to the question
18 that I asked at the outset which is what specific things
19 does Ms. Waldman want to actually do? And I'm not
20 inclined to give her no opportunity for discovery, but I
21 don't think six months is appropriate given the history
22 here and the fact that she chose, she made an affirmative
23 choice to join this lawsuit midstream. That was her
24 decision. And it doesn't create a conflict for her to
25 make that choice but that choice has consequences and one

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1 of the consequences is that she's not going to get the
2 full length of time that the other parties have had to
3 conduct discovery. It's not reasonable and more
4 fundamentally, it's not proportionate to the needs of the
5 case because you have failed to elucidate what
6 specifically she needs to do and how that would be
7 proportional as opposed to just redundant with regard to
8 what the prior defendants already attempted to accomplish
9 with regard to discovery.

10 So my conclusion is that I'm going to give you
11 four weeks to complete the two depositions that have been
12 identified in this phone call. In the absence of
13 specific additional things that you want to do, I don't
14 see a basis to extend the time for discovery any further
15 than that. Mr. --

16 MR. TOBEROFF: Your Honor?

17 THE COURT: Yes.

18 MR. TOBEROFF: Your Honor, if I may? Yes.

19 Firstly, I did give examples of discovery. I can go on
20 and on about the discovery that Rachel would like to
21 take. She'd like to issue 25 interrogatories to Marvel.
22 She'd like to inquire -- all the copyrights are
23 registered in the name of shell companies for which Stan
24 Lee did not work, who paid no money for these works. In
25 the process of discovery in prior interrogatories Marvel

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1 has indicated that the company that was a functioning
2 company and wasn't a shell company and had a servicing
3 arrangement with a shell company but had provided no
4 servicing agreement or any evidence of that sort, she has
5 the right to have 25 interrogatories. She would like
6 responses to those interrogatories. And we would ask
7 about those shell companies.

8 One of Marvel's key witnesses is a gentleman by
9 the name of Roy Thomas and Roy Thomas gave his deposition
10 in this case and she would delve further in discovery
11 about the relationship between Roy Thomas and Marvel
12 because he had testified in Marvel's behalf --

13 THE COURT: Mr. Toberoff, Judge Morrison
14 directed you to make your applications for discovery to
15 me. None of this is set out in your letter. My opening
16 question to you is what specific discovery steps do you
17 wish to take and you went on and on about the procedural
18 due process implications of denying her a lengthy period
19 for discovery instead of answering my question. Only
20 when I issued my ruling stating that you could do the two
21 depositions do you come forward with specific things you
22 are now stating you would like to do. I'm not granting
23 you unlimited, un-ferreted six months of additional
24 discovery.

25 If you would like to reduce to writing the

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1 specific things that you would like to do and submit it
2 within three days, Marvel will have three days to respond
3 and I will make a determination from there.

4 In the meantime, the parties have four
5 additional weeks to conduct the two depositions that were
6 described. The deposition of Ms. Waldman and the
7 deposition of Marvel to the extent Ms. Waldman is seeking
8 to take that. If there are issues pertaining to that,
9 Marvel can make a motion to me at the appropriate time.

10 That is my ruling on the basis of the papers
11 that have been submitted thus far and the argument that
12 has been adduced today. You have three days, not
13 including the weekend, to make an application if you have
14 specific things you want to do.

15 But to the extent she's seeking to do redundant
16 things that have already been attempted by the prior
17 representatives on the defense side, the application is
18 going to be denied.

19 So as of now, I would like your submission by
20 March 7th and Marvel will have until March 10th to
21 respond.

22 With that, Mr. Toberoff, I have another
23 conference on in about five minutes. Is there anything
24 else I can do today?

25 MR. TOBEROFF: Thank you, your Honor.

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1 MS. LENS: Thank you, your Honor.

2 THE COURT: Ms. Lens, anything further for
3 today?

4 MR. TOBEROFF: No, your Honor.

5 THE COURT: All right. Thank you both. Have a
6 great afternoon. Bye-bye.

7 (Matter concluded)

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C E R T I F I C A T E

I, MARY GRECO, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 3rd day of March, 2023.



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